No. 91-1513
In the Supreme Court of the United States
October Term, 1992

UNITED STATES DEPARTMENT OF THE TREASURY and MITCHELL A. LEVINE, ASSISTANT COMMISSIONER,

Petitioners,

v.

GEORGE FABE, SUPERINTENDENT OF INSURANCE, STATE OF OHIO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE STATES OF MICHIGAN ARIZONA, CALIFORNIA, FLORIDA, IDAHO, KANSAS, MAINE, MARYLAND, MINNESOTA, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, PENNSYLVANIA, TENNESSEE, UTAH, AND WEST VIRGINIA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a state statute governing the liquidation of an insolvent insurance company is a law "regulating the business of insurance" within the meaning of the McCarran-Ferguson Act.

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STATEMENT OF INTEREST OF AMICI CURIAE

Recent years have witnessed a dramatic increase in the number of insurance company insolvencies. Because the regulation of insurance has traditionally been a matter of exclusive state concern, the various states have constructed a complex and specialized regulatory framework for the rehabilitation and liquidation of insurers. While each state's insurance statute is different in some details, most of the states' insolvency laws are modeled after the uniform act developed by the National Association of Insurance Commissioners (NAIC).

In this case, the federal government seeks to supersede the Ohio insurance law which provides for an order of priority of claims against the remaining assets of an insolvent insurer. The United States

contends that the federal claim as obligee on certain bonds takes priority over all other claims, including those of other bond holders and policyholders. The amici curiae who join to file this brief represent states for whom approval of the federal priority now urged by the United States would seriously reduce their ability to protect their state's policyholders, profoundly drain their already scarce revenues, and severely disrupt the efficiency and stability of interstate, cooperative insurance company liquidations in which the state insurance commissioners, by law, serve as receivers.

Because the federal government has entrusted the power to regulate the insurance industry to the states, state

governments have accepted the concomitant responsibility to act as the ultimate protector of the policyholders -- an interest comparable to that of the federal government's interest in protecting depositors of banks and savings and loans. Much like the role played by the Federal Deposit Insurance Corporation in protecting bank depositors, all states have established guaranty funds for life and health insurance and for property and casualty insurance which act as a safety net for the prompt payment of policyholder claims in cases of insurance liquidations. These funds, created by state statute, pay the claims of the policyholders of the insolvent insurance company and then subrogate themselves to the aggregate claims paid.

That portion of the payments to policyholders which the guaranty funds are unable to collect from the insolvent company's assets is then assessed to all the insurance company members of the guaranty fund association, in which membership is mandated by law. The members are assessed their pro-rata share of the guaranty fund shortfall based on premiums written and in turn are permitted, in Michigan and in most other states, a 100% credit against state taxes. Thus, the shortage of funds with which to pay policyholder claims is subtracted from the tax revenues of the state. Since most states also have constitutional provisions requiring a balanced budget, this means that the shortfall in revenue must be captured from other sources.

In addition to the drain on state treasuries, assigning first priority to the federal claim, as urged by the United States, would interfere with the efficient distribution of the assets of the estate. Under the federal priority statute, state insurance commissioners, as receivers, would face potential personal liability for any claims paid before paying the federal government's claim. Accordingly, any prudent receiver of an insolvent insurance company with knowledge of taxes or other federal claims would delay paying any claims for fear that the ultimate determined debt owed to the federal government might be greater than the available assets of the receivership. If the position advanced by the United States is adopted by this Court, the distribution of the assets of

an insolvent insurer could be delayed by years.

Even if the guaranty funds could pay the claims of the policyholders, they would not be able to obtain asset advances from the receiver to do so, but would instead have to borrow funds to make the payments until such time as the assessments are levied and collected from the insurance companies, again passing the cost of insurance insolvencies to the state taxpayers.

Even in those few states, such as California, in which state priority statutes place federal claims above policyholder claims and which do not grant tax credits for guaranty fund contributions, a decision in favor of the United States would have serious repercussions. Such a

decision would infringe upon, if not defeat, the Uniform Insurer's Liquidation Act's eminently workable procedure, analogous to bankruptcy proceedin s, which places all assets and claims under the exclusive control of one state court.

In <u>Burford</u> v <u>Sun Oil Co</u>, 319 US 315 (1943), this court held that federal courts may properly decline to hear cases within their jurisdiction when to do so would impair the "independence of state governments in carrying out their domestic policy." <u>Id</u>. at 318.

Numerous federal opinions have relied on McCarran-Ferguson to find <u>Burford</u> abstention appropriate in claims against insolvent insurers involved in state liquidation proceedings under the Uniform Act. <u>See</u>, <u>e.g.</u> <u>Law Enforcement Ins Co</u> v

Corcoran, 807 F2d 38 (CA 2, 1986); Lac D'Amiante du Quebec v American Home Assurance Co, 864 F2d 1033 (CA 3, 1988); Martin Insurance Agency, Inc v Prudential Reinsurance Co, 910 F2d 249 (CA 5, 1990); Hartford Casualty Ins Co v Borg-Warner Corp, 857 F2d 699 (CA 10, 1988).

A decision for the United States in this case would thus invite federal courts to hear proceedings involving insurance companies in liquidation. Since most insurers have policyholders and assets in many states outside the state of domicile, state insurance commissioners will be forced to defend actions in a multitude of federal courts and will also face the possibility of the dissipation of assets through post-judgment attachments or levies. Payment

of claims through post-judgment proceedings could give these litigants a priority or preference, thereby encouraging all claimants to seek such "federal" assistance rather than complying with the state statutory scheme.

Amici states therefore urge the Court to consider the full effect of its decision in this case.

SUMMARY OF ARGUMENT

This case requires the interpretation of Section 2(b) of the McCarran-Ferguson Act, 15 USC § 1012(b). The section contains two distinct clauses: a primary clause that provides that no act of Congress shall supersede any state law regulating the business of insurance unless the act specifically relates to

the business of insurance; and a proviso, which provides that certain specified federal antitrust laws shall apply to the business of insurance "to the extent that such business is not regulated by state law." The primary clause requires a determination whether a state statute "regulates the business of insurance," while the proviso requires a narrow focus on a particular activity to determine whether that practice constitutes the "business of insurance."

The instant case involves a direct attack on a state statute under the federal superiority statute, 31 USC § 3713, and therefore requires analysis under the primary clause. A state statute "regulates the business of insurance" if it is aimed at protecting or regulating,

directly or indirectly, the relationship between the insurance company and the policyholder. SEC v National Securities, 393 US 453 (1969). The Ohio liquidation statute, which provides for the satisfaction of policyholder claims in the event of insolvency of an insurer, clearly meets the requirements for a state law "regulating the business of insurance."

Because the narrower exemption for the antitrust laws embodied in the proviso requires consideration of a particular activity of an insurer, this Court has developed a three-factor test to determine whether the activity is the "business of insurance." Union Labor Life Insurance v Pireno, 458 US 119 (1982). The Court has never applied the Pireno test to a state statute challenged

under McCarran-Ferguson, and has explicitly recognized that the proviso clause provides only a limited exemption in antitrust cases. Group Life & Health Insurance Co v Royal Drug Co, 440 US 205, 218, n 18 (1979). The Pireno factors are therefore inapplicable to this case.

The federal superiority statute does not apply to cases in the federal bankruptcy courts. The United States' claim in this case is therefore made possible only because insurance companies are exempt from the bankruptcy act. In making the exemption it is clear that Congress intended to prevent, not foster, federal encroachment in this area.

The fact that Congress used the words "No Act of Congress...." and made separate provision in McCarran-Ferguson for

the antitrust laws, as well as the National Labor Relations Act, the Fair Labor Standards Act and the Merchant Marine Act, demonstrate that the drafters intended no unspoken exception for the federal superiority statute.

ARGUMENT

INTRODUCTION

> The versatility with which argument inverts state and national power, each in alternation to ward off the other's incidence, is not simply a product of protective self-interest. It is a recurring manifestation of the continuing necessity in our federal system for accommodating the two great basic powers it comprehends.
>
> Prudential Insurance Co v Benjamin, 328 US 408 (1945).

This case results from a direct conflict between claims of state and federal authority involving interpretation of the

McCarran-Ferguson Act, 15 USC §§ 1011-1015, by which Congress, in 1945, ceded to the states the authority to regulate the business of insurance.

This Court has considered the McCarran-Ferguson Act on a number of occasions. In all recent cases coming before the Court, however, the Act has been employed as a defense by parties whose activities have allegedly violated federal law. Since the various states whose regulatory authority was asserted as a shield in those cases were not parties, their actual interest in the outcome, if any, cannot be determined from a reading of the cases. By contrast, the instant case presents a direct attack on the regulatory authority of the State of Ohio by the federal government.

The issue is fairly simple, though the statutory framework upon which its resolution depends is somewhat more complex. Upon the dissolution and liquidation of an insolvent insurance company, may the states regulate the order of priority of claims for the protection of policyholders and state taxpayers, or must the claims of the federal government take first priority?

The United States seeks priority for its claims under the authority of the federal superiority statute, 31 USC § 3713. That Act provides, in pertinent part:

> (a)(1) A claim of the United States shall be paid first when -
>
> (A) a person indebted to the Government is insolvent and -
>
> (i) a debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed.

(2) This subsection does not apply to a case under Title 11.

Subsection (a)(2) of the Act provides that federal superiority is not available in cases in federal bankruptcy court under Title 11. Thus, the United States' claim against Ohio Insurance Commissioner Fabe as liquidator of American Druggists Insurance Company in this case arises only because insurers are specifically excluded from Chapter 7 and Chapter 11 of the federal bankruptcy law. 11 USC § 109(b)(3); 109(d). The long-standing exclusion of insurance liquidations from the federal bankruptcy courts, however, was made in deference to the regulatory authority of the states. The Senate

Report on the Bankruptcy Reform Act of 1978, P.L. 95-598, states:

> Banking institutions and insurance companies engaged in business in this country are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liquidation under various State or Federal regulatory laws.
>
> S. Rep. No. 989, 95th Cong. 2d Sess. 31 (1978).

The rationale was further stated by the United States District Court for the Central District of California as follows:

> In the case of insurance companies, most states have enacted regulatory schemes which include provisions for insolvency. Since these schemes are designed to protect the interests of policy holders in the event of insolvency, Congress in enacting Section 4 [11 USC § 22, the predecessor to § 109(b) of the present Act] decided that liquidation of insurance companies should be left to the states. _In re Union Guaranty & Mortgage Co._, 75 F.2d 984 (2d Cir. 1935); _In re Supreme Lodge of the_

Masons Annuity, 286 F. 180, 184 (N.D.Ga. 1923). Since the reorganization of an insurance company or its adjudication as a bankrupt under the Act would preempt state liquidation proceedings for that company, Congress enacted Section 4 to preserve the exclusive jurisdiction of the states over the liquidation of insurance companies and to prevent the reorganization of insurance companies or their adjudication as bankrupts. See Woolsey v Security Trust Co., 74 F.2d 334, 337 (5th Cir. 1934).

In re Equity Funding Corp of America, 396 F Supp 1266, 1275 (CD Cal, 1975), aff'd 519 F2d 1274 (CA 9, 1975).

There is, therefore, some irony in the fact that the State of Ohio, having enacted a comprehensive insurer liquidation statute, now finds the priorities established by the state for the protection of policyholders and other claimants subject to an attack by the federal government made possible by the very exemption from the federal bankruptcy laws

that was enacted to prevent, not facilitate, federal encroachment on state regulatory authority. Clearly, Congress did not intend such a result.

In resisting the federal superiority claim in this case, Commissioner Fabe has relied on the McCarran-Ferguson Act's provision which states that laws "regulating the business of insurance" may not be superseded by federal laws which do not specifically state their applicability to insurance. Since the federal superiority statute, quoted above, does not explicitly provide for its application to insurance liquidations, the controversy in the lower courts has centered on the question whether the Ohio statute providing for the liquidation of insolvent insurers is a law "regulating the

business of insurance," as that phrase was intended to be understood by the Congress that enacted McCarran-Ferguson.

The Sixth Circuit Court of Appeals in this case, and most other courts which have considered this issue, have applied a three-factor test articulated in Union Labor Life Insurance Co v Pireno, 458 US 119 (1982). See, e.g. Gordon v US, 668 F Supp 483 (D.Md. 1987), aff'd 846 F2d 272 (CA 4, 1988); State of Idaho ex rel Soward v US, 858 F2d 445 (CA 9, 1988), but see In the Matter of Union Indemnity Insurance Co, 551 NYS 2d 446 (Sup Ct 1990), aff'd sub nom Curiale v US, 170 AD2d 342, 566 NYS 2d 853 (1991), Petition for cert pending, No. 91-1347. In this case, the United States argues that the application of the Pireno factors

requires this Court to reverse the decision of the Sixth Circuit Court of Appeals. Amici States urge the Court to consider their contention that Pireno's three-factor test does not, and was never intended to, apply to the type of case now presented.

Amici contend that the structure of the McCarran-Ferguson Act, its legislative history, and this Court's previous opinions demonstrate that the Act's major purpose is to provide broad protection from federal interference with state regulation of the insurance industry. Its secondary purpose is to ensure that the federal antitrust laws apply to the activities of insurance companies unless the specific practice at issue constitutes the "business of insurance" and is

regulated by the state. Under this analysis, the Ohio liquidation statute may not be superseded by the federal superiority statute.

I.

CONGRESS INTENDED THE PRIMARY CLAUSE OF SECTION 2(b) OF THE McCARRAN-FERGUSON ACT TO PROVIDE A BROADER EXEMPTION FROM FEDERAL REGULATION THAN THAT OF THE PROVISO.

The starting point in any case involving construction of a statute is the language of the Act itself. St Paul Fire & Marine Insurance Co v Barry, 438 US 531 (1978). The preamble to the McCarran-Ferguson Act sets forth its purpose:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> 15 USC § 1011.

Section 2(a) states:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> 15 USC § 1012(a).

It is the construction of section 2(b) which is at issue in the present case. Amici believe that it is critical for the resolution of this conflict to note that section 2(b) contains two distinct clauses. The primary clause establishes a broad prohibition:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: ...

This sweeping language is followed by a proviso which applies specifically to three federal antitrust statutes. The proviso states in pertinent part:

> Provided, That after June 30, 1948, the ... Sherman Act, and ... the Clayton Act, and the ... Federal Trade Commission Act ... shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> 15 USC § 1012(b).

Amici contend that the correct analysis to be applied under Section 2(b) depends upon whether the case arises under the primary clause or under the proviso.

A. BECAUSE THE PROVISO TO SECTION 2(b) APPLIES ONLY TO THE ANTITRUST LAWS, THE MORE GENERAL PROHIBITION OF THE PRIMARY CLAUSE NECESSARILY AFFORDS A BROADER EXEMPTION THAN THE PROVISO.

The McCarran-Ferguson Act was passed in 1945 in response to this Court's deci-

sion in United States v South-Eastern Underwriters Assoc, 322 US 533 (1944), which had overruled previous precedent and held that the transaction of insurance was interstate commerce. Prior to that decision, the regulation of insurance was considered the exclusive prerogative of the states.

As finally passed, the Act was the result of compromise. Generally speaking, the House of Representatives preferred to exempt the insurance industry from any federal regulation whatsoever, while the Senate was reluctant to provide for insurers a total exemption from the antitrust laws. (See, e.g. remarks of Sens. Murdock and McCarran, 91 Cong. Rec. 1484-1485 (1945); SEC v National Securities, 393 US 453, 458 (1969)). As

enacted, the law provided a three-year moratorium from the application of the antitrust laws to the insurance industry. During the moratorium it was expected that the states would enact their own antitrust-type legislation to regulate the activities of the industry. (See, e.g. remarks of Sens. McCarran, Murdock and Ellender, 91 Cong. Rec. 1442 (1945).) Following the moratorium, under the proviso clause of section 2(b), the three specified antitrust laws would be applicable to the business of insurance "to the extent that such business is not regulated by State law."

The primary clause of Section 2(b) is cast in prohibitive language: "No Act of Congress shall ...." The language of the proviso, by contrast, is cast in the

affirmative: "the [antitrust laws] shall be applicable ...." This textual difference cannot have been inadvertent, given Congressional concern that the insurance industry remain subject to antitrust regulation, whether by the federal government or the states, and its declaration that the "continued regulation ... by the several States of the business of insurance [was] in the public interest." 15 USC § 1011. The interpretation of Section 2(b) most consistent with its express terms, therefore, is that the words of the proviso making the antitrust laws applicable "to the extent such business is not regulated by state law," suggest that Congress intended the federal antitrust laws to fill in any "gaps" left unregulated by the states. (See, e.g. remarks of Sens. O'Mahoney, White,

McCarran and Murdock, 91 Cong. Rec. 1444 (1945).)

This interpretation is also supported by a careful reading of the prior opinions of this Court.

B. THIS COURT HAS EMPLOYED DIFFERENT ANALYSES TO CASES UNDER THE TWO CLAUSES OF SECTION 2(b).

Prior decisions of this Court indicate that the nature of the analysis employed is quite different depending upon whether the case arises under the primary clause of section 2(b) or under the antitrust proviso. When considering the primary clause, the Court has determined, in the first instance, whether a state statute regulates the business of insurance, and, if so, whether the proposed invocation of federal authority

"invalidates, impairs or supersedes" the state law. When considering the proviso, the Court has examined a particular activity engaged in by an insurer, and sought to be regulated by the federal antitrust laws, and has determined whether that single activity constitutes the business of insurance. With regard to the three-part test developed in Group Life & Health Insurance Co v Royal Drug Co, 440 US 205 (1979), and articulated in Pireno, supra, the Court has applied the three criteria only to antitrust cases, and has clearly stated in each instance that it was articulating a test to be applied to antitrust cases under the proviso clause of Section 2(b) of McCarran-Ferguson.

This case, therefore, presents the Court with an opportunity to clarify the

distinction between the broad language of the primary clause directed to "Act[s] of Congress" in general, and the specific and more limited exemption for the antitrust statutes contained in the proviso.

1. UNDER THE PRIMARY CLAUSE OF SECTION 2(b), A STATUTE REGULATES THE BUSINESS OF INSURANCE IF IT IS AIMED AT PROTECTING OR REGULATING, DIRECTLY OR INDIRECTLY, THE RELATIONSHIP BETWEEN THE INSURANCE COMPANY AND THE POLICYHOLDER.

In SEC v National Securities, 393 US 453 (1969), the Court considered the general prohibition contained in the primary clause of section 2(b). The Securities and Exchange Commission had alleged violations of federal securities law by an insurance company in connection with its merger with another insurer. It was alleged that the defendant companies had

made misrepresentations to stockholders in seeking their approval of the merger. The companies contended that, because the Arizona Insurance Commissioner was charged with the responsibility for protecting stockholders of insurance companies, the McCarran-Ferguson Act barred the SEC prosecution. The defendants pointed to an Arizona law aimed at regulating the merger of insurance companies, which required the Commissioner to find that the merger would not be "inequitable to the stockholders of any domestic insurer" or otherwise "contrary to law" before granting his approval.

When the matter reached this Court, it was held that the section of the Arizona statute which was designed to protect the interests of stockholders was

not a law regulating the "business of insurance." "Insurance companies may do many things which are subject to paramount federal regulation;" the Court stated, "only when they are engaged in the 'business of insurance' does the statute apply." Id. at 459-460. The Court went on to suggest the parameters of the meaning of the term "business of insurance":

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was--it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

Id. at 460. (Emphasis added.)

The Court concluded:

> The crucial point is that here the State has focused its attention on stockholder protection; it is not attempting to secure the interests of those purchasing insurance policies. Such regulation is not within the scope of the McCarran-Ferguson Act.

Id. Therefore, the Court held that the SEC prosecution was not barred by the Act.

The Circuit Court in the instant case, and the courts in Gordon and Soward, supra, did not discuss the fact that the National Securities Court considered a second section of the Arizona insurance law and found that that section did regulate the business of insurance. The second question arose because of the remedy sought by the SEC for the alleged

misrepresentation -- an unwinding of the merger of the two insurers. The federal authority to impose such a remedy was separately challenged as violating McCarran-Ferguson.

In Part II of its opinion, the Court noted that the SEC was seeking to unwind a merger which had been approved by the Arizona Director of Insurance, as required by state law:

> The fact remains, however, that the State of Arizona has approved a merger between two insurance companies which, as a matter of remedies, the Securities and Exchange Commission seeks to unwind. Moreover, Arizona has approved the merger not only under its laws relating to insurance securities but also in its capacity as licensor of insurers within the State. The applicable statute requires the State Director of Insurance to find that the proposed merger would not "substantially reduce the security of and service to be rendered to policyholders" before he gives his approval. Ariz Rev Stat Ann § 20-731B3 (Supp 1969). <u>This section of the statute clearly relates to the "business of insurance</u>." ...

<u>Id</u>. at 462. (Emphasis added.)

The fact that this second holding of the <u>National Securities</u> Court has generally escaped notice or comment is perhaps explained by the fact that even though the court found the statute aimed at the protection of policyholders (as opposed to stockholders) was a law regulating the business of insurance, the majority nevertheless found that the proposed SEC remedy was not barred by McCarran-Ferguson.

Under the circumstances of that case, the Court found the remedy was not prohibited because its application would not "invalidate, impair or supersede" the state law. The Court stated:

> ... Arizona has not commanded something which the Federal Government seeks to prohibit. It has permitted respondents to consummate the merger;

> it did not order them to do so. In this context, all the Securities and Exchange Commission is asking is that insurance companies speak the truth when talking to their shareholders. The paramount federal interest in protecting shareholders is in this situation perfectly compatible with the paramount state interest in protecting policyholders ....

> Id. at 463.

Thus, not finding a direct conflict between federal and state authority, the Court held that unwinding the merger by way of remedy for the alleged securities violation was not barred by the McCarran-Ferguson Act.

Under the primary clause of Section 2(b) of the Act, then, this Court's analysis has centered on the purpose of the state statute. Where the statute directly or indirectly regulates and protects the relationship between insurer

and insured, National Securities teaches that the state law is one "regulating the business of insurance" for purposes of the prohibition against federal encroachment provided by the McCarran-Ferguson Act. The United States therefore overgeneralizes when it asserts that the holding of National Securities is that "state regulation of an insurance company merger is not the business of insurance." Brief for the United States, p 14.

2. IN CONTRAST, UNDER THE PROVISO CLAUSE OF SECTION 2(b), A PARTICULAR ACTIVITY CONSTITUTES THE BUSINESS OF INSURANCE IF IT MEETS THE THREE-PART PIRENO TEST.

In Group Life & Health Insurance Co v Royal Drug Co, 440 US 205 (1979), this Court considered a case under the proviso clause of section 2(b) and explicitly recognized that the nature of the inquiry

depends upon whether the case is governed by the primary clause or by the proviso. In that case, a Texas pharmacy brought suit against an insurer, alleging that certain agreements between the insurer and other pharmacies violated section 1 of the Sherman Antitrust Act. In its defense, the insurer claimed that, under McCarran-Ferguson, its activities were exempt from the reach of federal antitrust laws.

In holding that the activities of the insurer in entering into the pharmacy agreements were not the "business of insurance," the majority emphasized, in a footnote, that it was considering a more limited antitrust exemption contained in the proviso clause of section 2(b):

> There is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of

> the activities of insurance companies, as it existed before the South-Eastern Underwriters case. The power of the States to regulate and tax insurance companies was threatened after that case, because of its holding that insurance companies are in interstate commerce. The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack. <u>The question in the present case, however, is one under the quite different secondary purpose of the McCarran-Ferguson Act--to give insurance companies only a limited exemption from the antitrust laws</u>.
>
> The repeated insistence in the dissenting opinion that the McCarran-Ferguson Act should be read as protecting the right of the States to regulate what they traditionally regulated is thus entirely correct--and entirely irrelevant to the issue now before the Court .... For <u>the question here is not whether the McCarran-Ferguson Act made state regulation of these Pharmacy Agreements exempt from attack under the Commerce Clause. It is the quite different question whether the Pharmacy Agreements are exempt from the antitrust laws</u>.

<u>Id</u>. at 218, n 18. (Emphasis added.)

<u>Royal Drug</u> was followed by <u>Union Labor Life Insurance Co</u> v <u>Pireno</u>, 458 US

119 (1982), in which this Court was asked to consider whether an insurer's peer review practices were exempt from antitrust scrutiny under the proviso clause of section 2(b) of McCarran-Ferguson. The Court articulated a three-factor analysis drawn from Royal Drug:

> In sum, Royal Drug identified three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Pireno, supra, at 129.

The Pireno court clearly stated that the purpose of the three-part test was to determine the applicability of McCarran-

Ferguson to antitrust cases and to determine whether a particular practice constituted the "business of insurance." It was not developed to determine whether a state statute "regulates the business of insurance." The application of the Pireno test to cases arising under the primary clause of section 2(b) is therefore inappropriate under this Court's prior decisions, which have recognized the distinction drawn by the structure of the Act and its legislative history.

The United States suggests that the use of the Pireno factors in two cases considering preemption of state law under the federal Employee Retirement Income Security Act of 1974 (ERISA) (29 USC § 1001 et seq) demonstrates that the Pireno test was not intended to apply

only to antitrust cases under McCarran-Ferguson. Brief for the United States, p 17, fn 7. In Metropolitan Life Insurance Co v Massachusetts, 471 US 724 (1985), and Pilot Life Insurance Co v Dedeaux, 481 US 41 (1987), the Court was called upon to interpret ERISA's "saving clause" which excepts from federal preemption under that Act any state law which "regulates insurance." 29 USC § 1144(b)(2)(A). In deciding whether the particular laws under consideration in those cases were laws regulating insurance, the Court "borrowed" the three-factor Pireno test.

Amici contend that the fact that the Court in Metropolitan Life and Pilot Life adopted the Pireno test in the interpretation of another act has no applicability whatsoever in the interpretation of the McCarran-Ferguson Act, although it might be noted that the Metropolitan Life case preserved the preeminence of the state statute.[1] The fact that the Court found Pireno useful in an unrelated context has no application to the question raised in this case.

One might argue that Pireno should apply to the interpretation of both clauses of section 2(b) because both the primary clause and the proviso refer to the "business of insurance." Upon further consideration, however, it is clear that the three-factor test is suited only to

[1]At issue in Pilot Life were state common-law tort decisions which the Court unanimously held were not "laws regulating insurance" for purposes of the ERISA saving clause.

the examination of a <u>practice</u> or <u>activity</u> which might run afoul of the antitrust laws as addressed in the proviso.

In the area of taxation, for example, although the primary clause exempts state taxation of the "business of insurance" from federal interference, taxes imposed on insurance companies as a whole are exempted, not only those taxes of the particular activities of the insurer that meet the <u>Pireno</u> criteria. <u>Western & Southern Life Ins Co</u> v <u>Board of Equalization</u>, 451 US 648 (1981).

This Court has also stated that state statutes requiring the licensing of insurance agents are laws regulating the business of insurance, and are exempt from Commerce Clause attack under the primary clause of Section 2(b) of

McCarran-Ferguson. <u>Robertson</u> v <u>California</u>, 328 US 440 (1945). In both <u>Western & Southern Life</u> and <u>Robertson</u>, while the insurance companies and the insurance agents obviously engage in some activities which would meet the <u>Pireno</u> standard, the taxation and the licensing statutes are not limited to those activities alone.

Finally, Section 4 of the McCarran-Ferguson Act states that the National Labor Relations Act, the Fair Labor Standards Act and the Merchant Marine Act apply to the business of insurance. It is obviously impossible to apply the labor laws solely to those activities of insurance companies defined as the business of insurance by <u>Pireno</u>, and therefore a broader interpretation of the phrase is necessary.

It is clear, then, from the cases decided by this Court and the structure of the McCarran-Ferguson Act itself, that the requirement of the proviso--that the antitrust laws apply to the business of insurance "to the extent that such business is not regulated by state law"--requires, in antitrust cases alone, a more specific focus on the precise practice or activity challenged--a focus not required in the consideration of other provisions of the Act.

The gravamen of a statute which regulates the business of insurance for purposes of the primary clause of section 2(b), then, is whether, directly or indirectly, it regulates the relationship between insurer and insured. National Securities, supra.

Clearly, the Ohio insurer liquidation statute meets that definition. By providing a mechanism for the state to take control of the assets of an insolvent insurer, and a system for applying those assets to the claims of policyholders, it has as its primary purpose the protection of the insured. Under the precedents of this Court, the Ohio statute regulates the business of insurance within the meaning of the primary clause of section 2(b) of the McCarran-Ferguson Act and may not be superseded by the federal law.

II.

SINCE, IN THE McCARRAN-FERGUSON ACT, CONGRESS DID NOT MAKE AN EXCEPTION FOR THE FEDERAL SUPERIORITY STATUTE, THAT ACT IS INCLUDED IN THE WORDS, "NO ACT OF CONGRESS".

Prior to the passage of the McCarran-Ferguson Act, this Court, in Knott v US,

298 US 544 (1935), held that the predecessor to the federal superiority statute could be successfully asserted in a state proceeding to liquidate the assets of a surety company.

The United States has claimed that because the avowed purpose of McCarran-Ferguson was to return to the status quo prior to the South-Eastern Underwriters case, the Knott holding mandates that federal superiority must prevail regardless of the passage of the Act and of half a century since Knott.

The following passage from the House Report on the Act is generally cited for the proposition that McCarran-Ferguson was intended only to nullify South-Eastern Underwriters and to work no other change:

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as for instance, in Allgeyer v. Louisiana (165 U.S. 578); St. Louis Cotton Compress Co. v. Arkansas (260 U.S. 346); and Connecticut General Insurance Co. v. Johnson (303 U.S. 77).
>
> H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945).

The legislative history upon which the United States relies supports Ohio and the Amici States' position, not the United States'. An examination of the three cases cited in the House Report quoted above demonstrates that the

drafters were not considering an unspoken exemption for certain additional acts when they stated that McCarran-Ferguson was not enacted to give the states greater regulatory power than they had had prior to the South-Eastern Underwriters decision. In all three of the cases cited in the report, this Court had held that a state could not assert its regulatory authority over transactions which occurred outside its borders. By citing these three cases, the House Report made clear that it was this Court's interpretation of the reach of the states' authority (which, at the time of those earlier decisions, was not questioned) that Congress sought to preserve and not the application of unnamed federal acts. Further, the legislative history contains an express statement by

the bill's sponsor that the prohibition applied to all acts of Congress existing at the time of its passage:

> MR. MURDOCK. I invite the Senator's attention to paragraph (b) of section 2 of the bill, reading as follows:
>
> (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides.
>
> That part of the bill is applicable, is it not to Federal statutes now in existence?
>
> MR. FERGUSON. That is the purpose of the section.
>
> 91 Cong. Rec. 479 (1945).

There is, however, no need to rely on legislative history to interpret the words of an Act which are unmistakably clear. Section 2(b) begins with the words, "No Act of Congress ...." The

United States would argue that those words were intended to mean no act of Congress except the superiority statute. This in spite of the fact that Congress did, in section 2(b) and elsewhere in the Act, make provision for a number of statutes which were to be given a partial exemption from the broad prohibition of the primary clause of Section 2(b). In section 4, as previously noted, the drafters specified that "Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance" of the National Labor Relations Act, the Fair Labor Standards Act and the Merchant Marine Act. 15 USC § 1014.

There is, therefore, no support for the position of the United States that

the superiority statute was implicitly excepted from the McCarran-Ferguson Act.

CONCLUSION

For all of the reasons stated above, Amici Curiae urge this Court to hold that the Ohio insurer liquidation statute is a law regulating the business of insurance under the McCarran-Ferguson Act, and may not be superseded by 31 USC § 3713.

Respectfully submitted,

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